IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION.

WRIT PETITION No.5755 OF 1995.

1. President,
Mahila Mandal Sinnar,
District Nashik.

2. Head Master,
Matoshree Sagunabai Bhiksua
Prathamik School, Sinnar.

..PETITIONERS.

Versus.

Smt.Sunita Bansidhar Patole,
Resident of Tanaji Chowk
Post. Sinnar,
District Nashik. **..RESPONDENT.**

Mr.P.N.Joshi, Advocate for Petitioner.

Mr.Ashok G. Toraskar,Advocate for
Respondent.

CORAM:R.M.S.KHANDEPARKAR,J.

DATED:15TH NOVEMBER, 2006.

ORAL JUDGMENT

1. Heard.

2. The petitioners challenge judgment and order dated 7th of July, 1995 passed by the School Tribunal, Nasik in Appeal No.5 of 1993. By the impugned judgment the School Tribunal has allowed the Appeal filed by the respondent and has directed the petitioner- Management to reinstate the respondent to her original post

alongwith backwages and all the monetary benefits attached to the post.

3. The respondent was initially appointed in December, 1987 on leave vacancy for a period of five months. Thereafter under letter of appointment dated 1st of July,1988 she was appointed as an Assistant Teacher on the pay scale of Rs. 290-1-390-15-465. Fresh appointment order was issued on 28th May, 1990 as well as 31st May, 1991. The respondent's services came to be terminated with effect from 1.5.1992 and therefore the respondent filed the said Appeal which was allowed by the impugned order.

4. While challenging the impugned order, it was sought to be contended on behalf of the petitioners that the respondent was appointed in a temporary vacancy. The post was meant for the reserved category candidate,but the petitioner belonged to the open category,and hence the appointment of the respondent was not approved by the Social Welfare Department (Education). Considering the same, it was strenuously argued on behalf of the petitioners that the post was meant for the reserved category candidate, however, as no reserve category candidate was available at

the relevant time, every year fresh appointment letter was issued and the respondent was appointed on temporary basis with clear understanding that her appointment would come to an end, moment the reserved category candidate was to be found for appointment. Drawing attention to the orders issued every year, it was also contended that the orders nowhere disclose that the appointment was on permanent basis or that the respondent was a probationer. Referring to the letter dated 1st February, 1990 from the Social Welfare Department, it was contended that the approval was granted to the appointment of the respondent on temporary basis with specific clarification that the post was meant for reserved category candidate. It was also argued that unless the respondent is appointed on probation, he cannot claim deemed confirmation under Section 5(3) of the Maharashtra Employees of Private School (Conditions of Service) Regulation Act, 1978. In that regard reliance was placed upon the decision of the Apex Court in the matter of **Bhartiya Gramin Punarrachana Sanstha Vs. Vijaykumar and others, reported in 2003(1) MH.LJ 563.**

5. On the other hand, it is sought to be

contended that the respondent was appointed in a permanent and clear vacancy and not in a post meant for the reserved category candidate and she having worked continuously nearly for five years, on completion of the period of two years, she had acquired deemed confirmation in the services of the petitioner-Management and, therefore, the petitioners could not have terminated services of the respondent without following procedure required to be followed for taking any action in the nature of termination of services of a permanent employee. Drawing attention to the appointment orders issued, it was sought to be contended that the same nowhere disclose that the appointment was in temporary vacancy or that it was in the post meant for reserved category candidate. Referring to the impugned judgment, it was also argued that the same clearly discloses that the petitioners could not establish that the post was meant for reserved category candidate. Attention was drawn to the unreported decisions in the matter of **Anjarla Shikshan Sanstha Vs. Smt.Kumudini Devji Kulkarni and others in W.P. No. 4623 of 1995 delivered on 30th March, 1988 and in Lok Shikshan Mandal Sangali Vs. Gajanan Chandrakant Todkar in W.P. No. 5369 of 1996**, delivered on 10th of December,1998,

as also in **Venkatraman Shankar Vs. Mrs.Jasbir Kaur Anand and others in W.P. No. 2799 of 1990** decided on 17th February, 1997 and reported decision in **S.P. Mandal Vs. Presiding Officer, School Tribunal, Amravati and Another, 2005 (4) Mh.LJ 485.**

6. The Tribunal by the impugned judgment, after taking into consideration the facts of the case and taking note of the statutory provisions comprised under the M.E.P.S.Act, has arrived at a clear finding that there is nothing on record to disclose that the appointment of a teacher to have legal sanction thereto, it is necessarily to be approved by the Education Officer. The sanction by an Education Officer is merely to ensure Government's fund being made available to the Institution. Further, the respondent has rendered continuous service for five years and there is nothing on record to disclose that she was appointed in the post meant for the reserved category candidate. No Roster was produced nor the materials on record are sufficient to disclose her appointment in the post meant for reserved category candidate. Neither one month's notice of termination of services was issued to the respondent nor any enquiry was conducted. On these grounds the

termination of the service of the respondent has been held to be illegal.

7. It is not in dispute that the order of appointment issued on 1st July,1988 to the respondent did not disclose that the same was meant for any fixed period. It did not disclose that the appointment was on temporary basis. It did not disclose that the appointment of the respondent was in the post meant for the reserved category candidate. The order nowhere discloses that the appointment was liable to be terminated on availability of any reserved category candidate.

8. Undoubtedly, there was a clause that the appointment would be subject to the approval by the Education Officer at Nashik. However, the learned Advocate appearing for the Petitioners has fairly admitted that there is no statutory provision which makes it compulsory to obtain approval of Education Officer for such appointments of the teachers, though such approvals are invariably obtained to ensure availability of grant- in-aid to the institution. At the same time, it is also a matter of record that from the time of appointment in the year June, 1988, she

continued to be in service of petitioner - Management till the date of issuance of order of termination of services. The order of termination was issued in 1992.

9. Section 5 (1) of the M.E.P.S.Act provides that the Management shall, as soon as possible, fill in, in the manner prescribed, every permanent vacancy in the private school by appointment of a teacher duly qualified to fill such vacancy. Sub Section (2) provides that every person appointed to fill a permanent vacancy shall be on probation for a period of two years. Subject to the provisions of Sub-Sections (3) and (4), he shall, on completion of this probation period of two years, be deemed to have been confirmed. Sub-Section (3) empowers the Management to terminate the services of the employee on probation during such period if the services rendered by the probationer is not found satisfactory.

10. Sub-Section (5) of Section 5 provides that "Management may fill in every temporary vacancy by appointing a person duly qualified to fill such vacancy. The order of appointment shall be drawn up in the form prescribed in that behalf, and shall state

period of appointment of such person."

11. Needless to say that in terms of the Constitutional mandate certain posts are to be filled in by the reserved category candidates. It is the contention of the petitioner-Management that the post in question was meant for reserved category candidate. At the same time, it is not in dispute that the filling of the post by the Reserved Category Candidate has to be on the basis of Roster maintained in that regard. In the case in hand, the petitioners at no stage of the proceeding, has produced the Roster so as to support their contention that the post which was occupied by the respondent was meant for reserved category candidate. It can hardly be disputed that the best method to ascertain whether the post is meant for reserved category candidate or not, is by following the roster maintained by the management. However, inspite of it being the best piece of evidence to decide the point in issue, it is not understood why the petitioners have chosen not to produce the Roster either before the Tribunal or even in this Petition. There is no explanation forthcoming in that regard. There is no other cogent evidence to establish that the said

post was reserved for reserved category candidate. On that count itself the respondent would be justified in contending that adverse inference is to be drawn against the petitioner - Management,and in favour of the Respondent in relation to the contention that the post is meant for reserved category candidate. Even otherwise, the records placed before the Tribunal or this Court, nowhere disclose that the post was meant for reserve category candidate.

12. Reliance is being placed on the letter of Education Officer dated 1st of February, 1990 to contend that the post was meant for reserved category candidate. Undoubtedly, Education Officer in the said letter had said that the petitioners have not appointed sufficient number of reserved category candidates in their Institution on account of non-availability of reserved category candidates and that therefore the appointment of the respondent was approved only for one year. However, letter nowhere discloses any reference to the Roster nor any other material which could reveal that the post wherein the respondent was appointed was meant for reserved category candidate. Saying that on account of insufficient number of reserved

category candidates, the approval to the appointment of the respondent was restricted for one year, is different from saying that the appointment of the respondent was in the post meant for reserved category candidate. There is no such assertion contained in the letter dated 1.2.1990 nor any basis being disclosed to make any such assertion. Being so, there was absolutely no material placed before the Tribunal, as rightly observed by the Tribunal, to hold that the post in which the respondent was appointed, was meant for reserved category candidate.

13. Attention was sought to be drawn to Section 5(5) to highlight the obligations of the management to maintain certain percentage of reserved category candidates amongst the employees, while contending that the post being meant for reserved category candidate, the appointment of the respondent ought to be held as the one in temporary vacancy. As already observed above, there was no material even before the management to arrive at the conclusion that the post wherein the respondent was appointed, was meant to be filled by appointment of a reserved category candidate. Being so, the question of invoking the provisions under Section 5(5) in relation

to the appointment of the respondent cannot arise and for the same reason the arguments advanced on the basis of the said provision are to be rejected as being devoid of substance.

14. Once it is clear that the post wherein the respondent was appointed was a permanent vacancy, unless it is specifically disclosed by the Roster that the same was meant to be filled in by appointment of a reserved category candidate, the provisions of Section 5(1) of the M.E.P.S.Act are clearly attracted. In the case in hand, it is not in dispute that the post which was occupied by the Respondent was a permanent vacancy. The contention that it was for reserved category candidate is already found to be devoid of substance. Obviously, when the respondent was duly selected and appointed by issuing appropriate order of appointment on 1st July, 1988, the same was to be considered as in terms of the provisions of law comprised under Section 5(1). Once there is an appointment in accordance with the provisions of law comprised under Section 5(1) and the candidate so appointed completes period of two years of service, the provisions of Section 5(2) are naturally attracted.

15. It was, however, sought to be contended that provisions of Section 5(2) would be attracted only in case where the person is appointed on probation. Every appointment made under Section 5(1) is deemed to be on probation till the person appointed completes period of two years and that is the intent behind Sub-Section (2) of Section 5 of the said Act. It is pertinent to note that phraseology of Sub-Section (2) clearly discloses that every person appointed to fill permanent vacancy " shall be on probation" for a period of two years and it further provides that subject to the provisions of Sub-Sections (3) and (4) of Sub-Section 5 "he shall on completion of this probation period of two years be deemed to have been confirmed."

16. Evidently, it provides for the deemed confirmation on completion of period of two years without any requirement of specific confirmation order by the management in that regard. Being so, in the case in hand, once the respondent had completed a period of two years from the date of appointment under letter dated 1st July, 1988 she ought to have been deemed to have been confirmed and for the

same reason her service could not have been terminated without following the procedure prescribed by law for termination of service of a permanent employee, which obviously includes issuance of notice, charge-sheet, enquiry etc. before passing an order of termination of services. The management admittedly has not done any such things.

17. The attention, however, on behalf of the petitioners was sought to be drawn to the orders of appointment issued every year and, therefore, it is contended that no benefit under Section 5(1) or (2) can be given to the respondent. The contention is devoid of substance. Merely because the management chooses to issue appointment orders every year, the appointment of the respondent ipso-facto cannot become a temporary one. The Management is bound by the provisions of law comprised under M.E.P.S.Act in relation to the appointments of teachers. Once it is not in dispute that vacancy which was filled by the appointment of the respondent was a permanent vacancy, as such appointment was after following the procedure prescribed for appointing a person in permanent vacancy irrespective of the appointment letters being issued every year, the appointment of the

respondent has to be construed as under Section 5(1) of the said Act. Being so, the so called appointment letters issued after 1st July, 1988 are to be considered redundant and without any legal consequence. As already observed, it is also to be noted that the order of 1st July, 1988 nowhere discloses appointment was on temporary basis or for the period of one year.

18. The decision of the Apex Court in **Bhartiya Gramin Punarrachana Vs. Vijay Kumar's case (supra)** is of no help to the petitioners wherein the Apex Court while considering the scope of Section 5(2) had held that:-

> . "A plain reading of Section 5(20 of the Maharashtra Employees of Private Schools (Conditions of Service) Regulation Act would show that it applies to a person who is put on probation consequent upon his appointment in a permanent vacancy."

19. Referring to the above quoted observation, it was sought to be contended that the appointment has to be on probation

and only thereupon the provisions of Sub-Section (2) of Section 5 would be attracted. As already observed, there is nothing called "appointment on probation". Once the appointment is made in terms of Section 5 (1) it takes colour of appointment on probation, by virtue of the provisions comprised under Sub Section (2) and that is what has been held by the Apex Court in the above decision.

20. The Division Bench of this Court in **Anjarla Shikshan Sanstha Vs. Smt.Kumudini Devji Kulkarni's case (supra)** had held that the appointment having been made in clear vacancy, it could not have been considered as appointment on temporary basis and, therefore, on completion of two years service, the appointee was entitled to the status of permanent employee.

21. The Division Bench of this Court in **Lok Shikshan Mandal, Sangli Vs. Gajanan Chandrakant Todkar's case (supra)** had held that

> "There is no provision under the Act or the Rules framed thereunder requiring an approval

for the appointment of an Assistant Teacher made by the Management, from the Education Officer. That approval may be necessary for getting grant in aid. Failure of the Management to get approval from the Education Officer does not entitled the Management to terminate the services of a Teacher, who is appointed on probation and whose record of service is satisfactory."

22. In **Venkatraman Shankar Vs. Mrs. Jasbir Kaur Anand's case,** it was held by this Court that in the absence of any material to indicate that the appointment to have been made in reserved category post and no Roster having been produced, the appointment ought to have been held to be in clear vacancy.

23. Similarly in **S.P. Mandal Vs. Presiding Officer, School Tribunal's case,** the learned Single Judge held that there was no material on record to show that candidate was appointed against a vacancy which was of temporary nature and the candidate, undisputedly, had required qualification to be appointed in the

post and he having successfully completed period of probation without causing any dissatisfaction in the performance of his duties, directions issued by the Tribunal for reinstatement of such person on his termination of services could not be found fault with.

24. It is then sought to be contended on behalf of the Petitioners that there is no justification to award full backwages to the respondent who has admittedly not granted service benefits during the said period. It is true that during the said period, the respondent is not granted service benefits. However, she cannot be blamed for the same. Undisputedly, during the pendency of the petition, the impugned order was stayed at the instance of the petitioners. Being so, the respondent cannot be denied backwages for the period from the time of presentation of petition till the disposal thereof by this Court. It is not the case of the petitioners that during the said period the respondent was gainfully employed else-where. However, considering the fact that during the pendency of the Appeal before the Tribunal,there was no stay to the order of termination of services, the petitioners would be justified in

disputing right of the respondent for full backwages during the period from the date of issuance of order of termination till the date of passing of the order by the Tribunal. In my considered opinion, therefore, the petitioners would be justified in contending that there is no case for grant of full backwages for the entire period.

25. For the reasons stated above, therefore, there is no substance in the Petition as far as it relate to the challenge to the order of Tribunal directing reinstatement of the respondent. The impugned order in that regard does not disclose any jurisdictional error to warrant interference in exercise of powers under Article 227 of the Constitution. However, the order to pay full backwages cannot be sustained.

26. It would be in the fitness of the case to modify the impugned order regarding the direction for backwages by directing the petitioners to pay 25% of backwages for the period from the date of issuance of the order of termination till the date of passing of the order by the Tribunal and further to pay 75% of the backwages for the period from the date of the order of the Tribunal till 30th of

November, 2006. The order of reinstatement issued by the Tribunal should be given effect to by the Petitioners within a period of eight weeks from today.

27. The petition, therefore, partly succeeds. As far as challenge to the order of reinstatement is concerned, the same is dismissed. As far as payment of back wages is concerned, the order in that regard is modified as above. Rule is made absolute in above terms with no order as to costs.

[R.M.S.KHANDEPARKAR,J]